UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

STEVENS CREEK CHRYSLER JEEP
DODGE, INC.

and

Cases 20-CA-33367
20-CA-33562
20-CA-33603
20-CA-33655

MACHINISTS DISTRICT LODGE 190, MACHINISTS
AUTOMOTIVE LOCAL 1101, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE
WORKERS OF AMERICA, AFL-CIO

GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF

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I. INTRODUCTION

In *St. Francis Medical Center,* 347 NLRB 368, 369 (2006), then-Member Schaumber stated the following regarding the failure by the administrative law judge to make explicit fact and credibility findings and the use of boilerplate credibility footnotes:

> Member Schaumber observes that the judge failed to make explicit fact and credibility findings in this case, a failure that created unnecessary ambiguity and reviewing difficulties. Throughout her decision, the judge cited both parties' widely conflicting versions of the facts without, in most cases, resolving those conflicts or stating which facts or witnesses she credited. See *Lewin v. Schweiker,* 654 F.2d 631, 635 (9th Cir. 1981) (courts have consistently required explicit credibility findings where such credibility is a critical factor in the decision). Moreover, in those few instances when disputed testimony was credited, the judge failed to articulate any specific reasons why one witness was credited over another. See *NLRB v. Cutting, Inc.,* 701 F.2d 659, 666-667 (7th Cir. 1983) (rejecting ALJ's credibility findings because the judge gave no reasons for crediting witnesses, and thus the findings "provide no basis for assessing the relative credibility of the witnesses"). Such unsupported findings are not cured by a boilerplate credibility statement which adds nothing to permit meaningful review. See *K-Mart Corp. v. NLRB,* 62 F.3d 209, 213 (7th Cir. 1995) (judge's "boilerplate comment concerning general credibility determinations," without further explanation, was inadequate for review)....

In *IBEW Local 429,* 347 NLRB 513, 516 (2006), rev'd and rem'd on other grounds, 514 F.3d 646 (6th Cir. 2008), the full Board appeared to adopt Member Schaumber's sentiments when it overturned the judge's crediting, with no explanation of why he did so, the "self-serving assertions of the Committee members on the ultimate issue, the Committee's motivation in attempting to have Page transferred to a different employer. Such self-serving declarations regarding motive are certainly not conclusive." [1]

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[1] *IBEW Local 429* and other cases were discussed in General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge (hereinafter General Counsel's Brief) at 7-10. See, in particular, *Jewel Bakery, Inc.,* 268 NLRB 1326, 1327 (1984), where the Board stated the judge's invocation of the demeanor factor does not make review of the judge's credibility resolutions inviolable, where said resolutions have omitted reference to relevant testimony without explanation.

In *Marshall Engineered Products Co.,* 351 NLRB No. 47 (2007), the Board, in overturning the judge's credibility findings, stated that it has consistently held that it was not bound by credibility resolutions "not based primarily upon demeanor" and that the judge's findings were only partially demeanor-based. The Board stated it had "historically given less deference to the demeanor of a witness when it finds that the judge has ignored or given insufficient weight to critical evidence. See, e.g., *Braclo Metals, Inc.,* 227 NLRB 973 fn. 4 (1977)." (Slip op. at p. 2, fn. 7; p. 3, fn. 10).

II. THE DISCHARGE OF PATRICK ROCHA

General Counsel respectfully submits that the instant case cries out for the Board to apply the principles discussed above. With respect to the discharge of Patrick Rocha, the judge's key finding was that Respondent had made the decision to fire him on February 27, before it learned of Rocha's union activity on March 2. This finding, for which the judge stated no reasons nor discussed any evidence, was based solely upon the testimony of Respondent's witnesses, Service Director Garcia and President Zaheri. But four documents prepared by Respondent, the Separation Notice, the letter to the Employment Development Department, Respondent's position statement to the Board, and Zaheri's statement given to the Board, all state or imply that the decision to discharge was made on Monday, March 5. The date the decision was made is crucial: if it was made on February 27, there is no employer knowledge; if it was made on March 5, then Respondent's articulated reason is false and must fail.

Garcia testified that he counseled Rocha on February 12, 19, and 26 about attendance. When Rocha was late on February 27, Garcia testified he contacted Zaheri, recommended discharge, and Zaheri approved. Garcia testified that he intended to discharge Rocha on March 2 but was delayed due to the unexpected arrival of a Chrysler factor representative. General Counsel

respectfully submits that Garcia's testimony is not corroborated by any piece of documentary evidence or any evidence at all, if the obviously-biased testimony of Zaheri, Respondent's owner and president, is discounted.

As in *St. Francis Medical Center,* the judge cited both parties widely conflicting versions of the facts, but, unlike *St. Francis,* the judge discredited Respondent's witnesses – specifically, Garcia – on almost all but the ultimate findings of motivation. Discrediting Garcia's denial, the judge found that Garcia stated, on the afternoon of March 12 after learning about the Union luncheon, he would "blow out" Rocha if he learned he was behind the organizing effort.[2] Discrediting Garcia's denial, the judge found that Garcia told Higgins the reason he was not hired was "pretty much" his relationship with the Union's business representative. Discrediting Garcia's numerous denials, the judge found that Garcia, threatened employees about their union activities, threatened plant closure and job loss, and granted wage increases to employees to dissuade them from supporting the Union. The judge did not explain why he credited Garcia when it came to the ultimate issue of Respondent's motivation when he had discredited him on almost everything else.

As in *St. Francis Medical Center,* the judge failed to articulate any reasons, let alone any specific reasons why one witness was credited over another. Rocha denied that he was counseled regarding his attendance; he testified that he approached Garcia to complain that he was not getting enough work. The judge never discredited Rocha; he just found, without explanation or without discussing contrary evidence, that the counseling sessions were held. As in *St. Francis,* the judge

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[2] Cell phone records established telephone calls the afternoon of March 2 between Garcia and General Manager Nickerson, calls that both Garcia and Nickerson falsely denied.

After denying that the comment had been made, Respondent, in its answering brief (Respondent's Brief), now suggests that Garcia made the comment to scare Lane from engaging in union activity. To counter General Counsel's argument that Garcia's comment is in the conditional meaning that there had been no decision to fire Rocha at that point (see General Counsel's Brief at 28-29), Respondent ironically suggests that Lane, not knowing that the decision to fire had already been made, would not have known Garcia was posturing. Respondent's Brief at 20-21.

used a boilerplate footnote regarding credibility. But as made clear by the authority cited above, such boilerplate adds nothing to meaningful review and does not cure unsupported findings.

As in *IBEW Local 429,* the judge credited Respondent's self-serving assertions on the ultimate issue of motivation without any explanation of why he did so. This motive – that Rocha had poor attendance – carries with it the factual corollary that the decision was made before March 2. The motive and its evidential support of timing must rise or fall together. In crediting Respondent's protestations of an innocent motive, the judge credited its testimony on timing. As with motive, the judge made no explanation as to his findings on timing.

As in *Marshall Engineered Products Co.,* the judge "has ignored or given insufficient weight to critical evidence." Specifically, the judge completely ignored Respondent's documents stating or implying the decision to fire Rocha was made after it acquired knowledge of union activity on March 2. This is the most critical factual issue with respect to the Rocha discharge.[3] Thus, the judge completely ignored the Separation Notice, letter to California Employment Development Department (EDD), Respondent's position statement, and Zaheri statement.[4] (See GC Exhs. 15, 31, 34, and 38, respectively.) The Separation Notice, which was handed to Rocha when he was terminated the morning of Tuesday, March 6, states:

> On 19th February, we had discussion on Patrick's ability to get to work done correctly and on time – on 26th of February we discussed this again. Still no improvement – left early without permission – did not advise anybody that he left."

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[3] Much time was spent on the secondary issue of whether Rocha's attendance was a matter of concern to Respondent. General Counsel submits that it was not and the judge's finding on this issue was unsupported by any evidence other than the bare testimony of General Manager Nickerson and contrary to the totality of the evidence. See General Counsel's Brief at 16-23. This issue is secondary to the primary issues of timing and motivation. Even if Rocha's attendance were a matter of concern, the evidence establishes that it did not become a problem until the onset of union activity. Further, Respondent could not get straight just exactly what it was discharging Rocha for in its separation notice, letter to EDD, position statement, and Zaheri's statement. See General Counsel's Brief at 23-29, discussing the pretext issues of shifting defenses, disparate treatment, and condonation.

[4] The only reference found in the ALJD as to any of these four documents is in the discussion of facts, where the judge quotes Respondent's reasons for the discharge; those reasons omit the alleged culminating tardiness on February 27. (ALJD at 5, ll, 34-35)

(GC Exh. 15) This notice says nothing about the alleged February 12 counseling session. Garcia testified that he gave Rocha a final warning on February 26, but the Excel spreadsheet containing Garcia's alleged notes of the February counseling sessions does not indicate such final warning. (See GC Exh. 16) The Separation Notice does not refer to any final warning (despite instructions thereon to document dates and descriptions of violations and warnings) and makes no reference to Rocha's coming in late on February 27. Regarding attendance, the reason advanced by Respondent at the hearing, for Rocha's discharge, the Notice only states "left early without permission – did not advise anybody that he left." Garcia could not explain any of these discrepancies. Given the common practice of many employees of extending lunch or leaving early by 30 minutes, Rocha left early (during the week ending on Friday, March 2) on February 27, 28, and March 2. On March 2, he left at 2:12 p.m. (R. Exh. 12) Garcia testified that he went to Zaheri and recommended discharge right after[5] Service Manager Frontella complained to him that Rocha came in late on February 27. (Tr. 970) This suggests that the discussion with Zaheri, when the discharge was approved, was during the workday on February 27. If Garcia gave a final warning (as he claims) on February 26, and the decision was made during the day on the 27th because Rocha came in late, the Separation Notice's explanation of "left early without permission" does not make any sense.[6] Respondent's letter to the EDD states that Rocha "was counseled about poor performance and failed to improve his performance, and he left work early in defiance of employer's express instructions that he not do so. Therefore, he was terminated." (GC Exh. 31) Again, the reason asserted for discharge is not coming in late but leaving early. Respondent's position statement recites the five matters allegedly addressed in the Excel spreadsheet, addresses

[5] "Q. What did you do next? A. Went to Mr. Zaheri." (Tr. 970)

[6] Rocha testified that, on March 2, he notified Frontella he had no work, Frontella told him to stick around for awhile, and after waiting unsuccessfully for work for 45 minutes, he left without notifying Frontella (but he did waive good-bye to Garcia). (Tr. 327)

verbatim the entries of February 19 and 26, and states: "No correction of the problems was evident on March 6, 2007, including an unauthorized departure. Accordingly, Rocha was terminated on March 6, 2007." (GC Exh. 34) Respondent contends that this document indicates only that Rocha was discharged on March 6, an accurate statement, but is silent as to when the decision was made. (Respondent's Brief at 12.) Respondent does not explain, however, why the position statement mentions that no correction of the problems was evident on March 6, if the decision to discharge had been made a week earlier.[7]

Any ambiguities that might remain about when Respondent made the decision to terminate Rocha are dispelled in the Zaheri statement. (GC Exh. 38) Zaheri testified that he handed that statement to the Board Agent investigating the Rocha discharge, that he asked a staff member to prepare it, and that he read the document before handing it to the Board Agent. He described the statement as the "position of the store." (Tr. 1245-1246) The statement concludes:

> On 2/26, in lieu of fixing the problem he was having, he took a 3.5 hour lunch, came in late on 2/27, left at 12:00 and never returned on 2/28, left early on 3/1 and again left early on 3/2.
>
> **On the following Monday, 3/5 he did not come in or call and the decision to terminate him was made.** A final check cut, paying him an extra 8 hours above what he had earned and letting him go in the morning on 3/6 when he came in late.

(Emphasis added.) Under ordinary rules of grammatical construction, the statement expressly states that the decision to terminate Rocha was made on Monday, March 5.[8] It strongly suggests that the reason for the discharge is leaving early on March 1 and 2 and not coming in at all on

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[7] Attorney position statements are receivable into evidence if they contain statements conflicting with the party's position. See, e.g., *McKenzie Engineering Co.,* 326 NLRB 477, 485 fn. 6 (1998).

[8] The final paycheck was cut that morning at 8:06 a.m. according to Respondent's payroll records . (R. Exh. 25; Tr. 972-973, 1061) Had Respondent intended to terminate Rocha on March 2, as Garcia claimed, it could have introduced similar payroll records to document a check cut that time on the morning of March 2. Respondent introduced no such document. As stated herein, Respondent has no document, such as a payroll record, personnel note, or even an email, that can support its claim that it decided to terminate Rocha during the workday on February 27 but was prevented by circumstances from carrying it out the morning of Friday, March 2.

March 5.[9] General Counsel does not believe the language used is capable of any other reasonable instruction. In any event, the evidence contained in the four documents discussed above is strongly probative on the critical issue of when the decision to fire Rocha was made, but the judge made no mention of any of the documents in stating his reasons for his decision. The Board's recent decision in *Marshall Engineered Products, supra,* requires reversal because the judge has "ignored or given insufficient weight to critical evidence."

As stated above, the critical factual issue herein is when was the discharge decision made. In *Vico Products Co.,* 336 NLRB 583 (2001), the Board overturned the judge's finding, based solely on his crediting the unsupported testimony of Schultz, the employer's president and owner, that he made the relocation decision in December 1996 before the advent of union activity. The Board overturned this finding based on the totality of the evidence. The Board concluded:

> Thus, one is left with only Schultz' testimony that he made the relocation decision in December 1996. We find that this **unsupported testimony does not satisfy the Respondent's *Wright Line* burden** of showing that the relocation was not discriminatorily motivated.

Ibid. at 590-591. (Emphasis added.) This case is quite similar to the instant case in important respects: (1) the *Wright Line* defense centered on the date the critical event took place; (2) no document existed to support Respondent's defense; (3) the totality of the evidence was at odds with Respondent's defense; and (4) the judge's finding was based on the unsupported testimony of the decision-maker.

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[9] The statement was reconstructed from Respondent's time records (see R. Exh. 12) and wrongly states that Rocha did not come in on March 5. Respondent's production records show him performing mechanic work that day. (GC Exhs. 23 and 24)

In *Bralco Metals, Inc., supra,* the Board overturned the judge's finding, which was based partially on considerations of demeanor,[10] because it found that the judge's findings and credibility resolutions concerning the nature and time of certain conversations were inconsistent with relevant and uncontradicted evidence not discussed by the judge. In *IBEW, Local 429, supra,* the Board overturned the judge's credibility findings, even though those findings were based partially on demeanor,[11] because of an admission, evidence of animus, timing, and the absence of evidence supporting the respondents' stated reason for the discipline. In this case, the judge's credibility finding – that Respondent was telling the truth on the ultimate issue of its motivation – is not supported by considerations of demeanor, other than the general boilerplate footnote that was not specific to Respondent's decisionmakers. Further, the judge found that Garcia admitted it would discharge Rocha if it found out he was a ringleader of the union activity. The timing could not be more suggestive, and the unfair labor practices found by the judge herein provide considerable animus. But this case goes way beyond *IBEW Local 429*. Respondent's own documents herein establish the falsity of its testimony over when the decision to fire Rocha was made, and there are no documents that support its testimony. This case also has strong evidence of disparate treatment (which is also probative of animus), shifting defenses, and condonation, which typically establish pretext. Therefore, General Counsel respectfully submits that, if there were ever a case where the judge's credibility findings should be overturned, this is the case.[12]

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[10] Unlike the instant case, the judge in *Bralco* actually discussed the specific testimony and demeanor of the witnesses he credited, Oxley and Barela. *Ibid.* at 980. The judge herein did not do so. Instead, he used a boilerplate footnote on credibility, a usage criticized by Chairman Schaumber and the appellate courts.

[11] "Moreover, based on my observation of the witnesses, I conclude that Brown's testimony is reliable." *IBEW, Local 429, supra* at 522.

[12] The judge found that "Nickerson credibly testified that Rocha cost the dealership time and money by clocking out early." ALJD at page 9, lines 41-42. The judge is simply wrong on this. See General Counsel's Brief at 16-23. Not only is the judge wrong, he failed to discuss one fact upon which this conclusion is reached, thereby depriving the Board and courts of meaningful review. Nickerson is the same witness who denied having any telephone conversations with Garcia the afternoon of March 2. Cell phone records established beyond a reasonable doubt that three such conversations took place. Nickerson flatly lied in this testimony. He was not mistaken or confused – he

III. THE FAILURE TO HIRE MARK HIGGINS

The judge, discrediting Garcia's denial, found that Garcia told Higgins Respondent was blackballing him because of his relationship to the Union business representative. (ALJD at 10, ll. 33-35) Nevertheless, the judge found that Respondent in actuality did not hire Higgins for other lawful reasons. General Counsel agrees with English common law judges that "no man would declare anything against himself unless it were true."[13] At a minimum, the judge's crediting of such a smoking-gun statement of unlawful intent required the judge to offer some explanation why he would credit Garcia's and Zaheri's testimony that there was some other lawful reason. Respondent contends that Garcia's statement does not constitute an admission and that use of the words "pretty much" to qualify the admitted blackballing indicates that the blackballing was only one of the reasons why Higgins was not hired. (Respondent's Brief at 24.)

Because the judge found that blackballing was a motivating factor, which Respondent now apparently admits, it has the burden not only of going forward but of persuading that it did not refuse to hire Higgins because of the blackballing. The judge's finding that Zaheri chose not to hire Higgins based on recommendations he had received is not based upon demeanor analysis. Thus, the Board is entitled to weigh the evidence independently. General Counsel respectively submits that the totality of the evidence, including the unfair labor practices found to have been committed herein and the anti-union animus contained therein and Garcia's efforts to hire Higgins because he needed an excellent mechanic, warrant the conclusion that Higgins was indeed blackballed for union reasons.[14]

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lied. He lied because he understood the importance of Garcia's threat to "blow out" Rocha to this case. The judge expressly found that Garcia was on the phone with Nickerson that afternoon (ALJD at page 7, line 31-32) but, inexplicably, failed to consider the impact of Nickerson's (and Garcia's) lying under oath upon his overall credibility.

[13] See General Counsel's Brief at 29-33.

[14] In *IBEW Local 429, supra,* the Board placed great stock in the admission of one of the committee members in overturning the judge's credibility findings and concluding that the committee acted with an unlawful motivation.

IV. CONCLUSION

The Board's policy on credibility determinations is designed to discourage a reviewing body from substituting its judgment for that of the finder of fact when such findings depend in substantial part upon how a witness presents himself on the witness chair. But demeanor has its limitations; many a conniver lives by his ability to deceive, and, as this case sadly demonstrates, the giving of one's oath, which has always been best enforced by a belief in a power much higher than an overworked federal prosecutor, is easily given these days without any regard for the consequences of breaking it.[15] For these reasons, cases such as this case, where there is every reason to conclude that Respondent was not telling the truth, should not be swept under the rug under the banner of *Standard Dry Wall Products.* In that case, the Board expressly noted that demeanor was just one of many tests to determine credibility. 91 NLRB 544, 545 fn. 4 (1950). General Counsel respectfully urges the Board to consider the totality of the evidence herein and decide accordingly.[16]

Dated at San Francisco, California, this 6th day of October, 2008.

/s/ David B. Reeves
David B. Reeves
Counsel for the General Counsel

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[15] No less a scholar of the human condition than William Shakespeare, whose insights and observations have been studied, analyzed, admired and debated for four hundred years, has noted the limitations of demeanor. In *MacBeth,* Duncan says: "There's no art to find the mind's construction in the face."

[16] Respondent contends that there was no showing that the Union ever represented a majority of the petitioned-for unit. (Respondent's Brief at 36.) This contention is demonstrably wrong. The judge found that nine mechanics signed authorization cards (ALJD at 3, ll. 1-2) and the evidence established that the petitioned-for bargaining unit consisted of thirteen technicians as of the date of the demand for recognition. (Tr. 18-19) Respondent points out that General Counsel misidentified General Counsel Exhibit 38 as Exhibit 34 in Exception No. 27. However, it is clear from General Counsel's brief that the Zaheri statement is General Counsel Exhibit 38, and Respondent has not been prejudiced by this inadvertent typographical error. General Counsel hereby requests that Exception No. 27 be amended to correctly refer to the Zaheri statement as General Counsel Exhibit 38.

FORM NLRB-877
(4-84)

UNITED STATES OF AMERICA
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STEVENS CREEK CHRYSLER JEEP DODGE, INC. and MACHINISTS DISTRICT LODGE 190, MACHINISTS AUTOMOTIVE LOCAL 1101, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS OF AMERICA, AFL-CIO	Case Nos. 20-CA-33367 20-CA-33562 20-CA-33603 20-CA-33655 DATE OF MAILING October 7, 2008

AFFIDAVIT OF SERVICE OF GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document*(s)* by facsimile, with their permission, upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me on **October 7, 2008**	DESIGNATED AGENT Susie Lowe **NATIONAL LABOR RELATIONS BOARD**